91-463

(1)

No.



In The

# Supreme Court of the United States

October Term, 1991

SANTO IDONE and MARIO EUFRASIO,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

1. May the judge in a federal criminal trial refuse to permit voir dire questions as to the identity, address and employment of jurors without any factual basis, fact-finding or procedure to reliably determine the need for such restrictions?

2. Whether the similarity of predicates requirement of the pattern element of the RICO [18 U.S.C. § 1962(c)] offense is satisfied by combining an isolated 1983 murder conspiracy charged against one defendant only with totally unrelated charges of 1986 gambling, usury and extortion involving a different group of persons, different location, objectives, victims and methods.

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**APPENDIX**

No.

In The

# Supreme Court of the United States

October Term, 1991

SANTO IDONE and MARIO EUFRASIO,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed their convictions entered upon a jury verdict in the District Court for the Eastern District of Pennsylvania.

## OPINIONS BELOW

The panel opinion of the Court of Appeals for the Third Circuit is reported at 935 F.2d 553 and appears as Appendix A, (1a) to this petition.

The District Court did not file an opinion.

## STATEMENT OF JURISDICTION

Petitioners seek review of the May 15, 1991 judgment of the Court of Appeals for the Third Circuit affirming their convictions following a jury trial in the United States District Court for the Eastern District of Pennsylvania which had jurisdiction under 18 U.S.C. § 3231 (Appendix B, 53a). Petitioners' timely rehearing petition was denied June 19, 1991 (Appendix C, 56a) This petition is timely filed and invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

**18 U.S.C. § 1961**

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union board group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at

least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years. (Excluding any period of imprisonment) After the commission of a prior act of racketeering activity;

* * *

**18 U.S.C.A. § 1962**

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

## STATEMENT OF THE CASE

### A. Procedural History

Petitioners were charged by indictment with racketeering, 18 U.S.C. § 1962(c), racketeering conspiracy, 18 U.S.C. § 1962(d), extortion, 18 U.S.C. § 1951, and gambling, 18 U.S.C. § 1955. The predicate acts charged in the racketeering counts were extortion, extortion conspiracy, conducting a gambling business in video poker machines, and collection of usurious debts. A superseding indictment added as against petitioner Idone only,

a predicate offense charge of conspiracy to commit a murder three years earlier than the other offenses, in a different county with different persons and bearing no other relationship to the primary charges just mentioned.[1]

This added charge was the subject of a motion to dismiss or sever on behalf of all defendants. The defense claimed that inclusion of a murder conspiracy impermissibly broadened the RICO charges by inclusion of unrelated predicates in the pattern.

Before jury selection, the government moved for an anonymous, sequestered jury. Defendants answered this motion, specifically denying its factual basis as well as the relevancy to these defendants of allegations of misconduct by other persons (Scarfo defendants) who had been already tried, convicted and jailed and who were not parties to this case.

The government's motion based its apprehension concerning juror safety on conduct of and allegations about the Scarfo defendants in an earlier case in the Eastern District of Pennsylvania. All of those defendants were in jail at the time of the government's motion. The government motion, as pointed out by the defendants' responses, alleged no threatening, dangerous or obstructive conduct or propensity of any of the defendants in this case. Defendants similarly denied that the allegations of prejudicial pretrial publicity warranted an anonymous jury. The Idone response asserted, in part:

> What is missing here is *any* evidence that Santo Idone, Gary Iacona, Mario Eufrasio or Francis Pettica present the type of threat to the jurors that justified sequestration and anonymity in *United*

---

1. The defendants-appellants in the Court of Appeals were Santo Idone, Mario Eufrasio and Cary S. Iacona.

> *States v. Scarfo*, 850 F.2d 1015 (3rd Cir. 1988), and the other cases cited by the government in support of its request. Throughout the motion, not a single mention by name is made of Iacona, Eufrasio or Pettica. The only instance in which they are even referred to is at page 9 where the government writes "allegations of dangerous and unscrupulous conduct are involved in the government's case against Idone, the other defendants, and the co-conspirators."

(Defense Answer, p. 2, Joint Appendix, p. A182).

As to Idone the response asserted:

> . . . with respect to Santo Idone [the government's motion] is deficient because no evidence even remotely suggests that Idone is the type of defendant who would try to improperly influence the jury in this case.
>
> * * *
>
> Santo Idone is a 70 year old retiree with no prior criminal record. Since he was released on bail almost a year ago, there have been no allegations of witness contacts or other improprieties. There is no evidence that he has ever tried to intimidate a witness or otherwise attempted to undermine the judicial process in this case or any other instance.

(Defense Answer, pp. 3, 4, Joint Appendix, pp. A183-184).

Without holding a hearing or making any fact-findings, the trial court, on January 2, 1990, granted the government's motion

for an anonymous jury and denied sequestration. It further ordered the marshal to pick up and disperse the jurors from a neutral site each day and sequester them during the trial day (Appendix D). Immediately before jury selection counsel for Idone renewed the objection, saying: ". . . It's appropriate at this point to record our objection, of course we have already submitted something in writing concerning that — the anonymous questionaire. But I would like the record to show our objection to those features of the questionaire that prohibit us from learning who the jurors are —." (Joint Appendix, p. A377).

Petitioners were convicted on all counts and sentenced to jail terms of 20 years for petitioner Idone and 10 years for petitioner Eufrasio. Appellate bail was denied.

In the Court of Appeals the defendants renewed their arguments concerning both the anonymous jury and the joinder of the 1983 murder conspiracy with the 1986 video poker gambling case as part of the same racketeering pattern.

All appellants argued (Eufrasio Brief, p. 20, adopted by Idone and others in accordance with F.R.A.P. Rule 28(i)) that a trial court, considering the employment of an anonymous jury must follow a fair procedure to determine the need for anonymity and develop a record evidencing such need in order to safeguard defendants' rights to an effective voir dire and to ensure an impartial jury. The issue was addressed again at page 22 of the joint reply brief filed by Idone and Eufrasio.

The Third Circuit opinion specifically approved the use of an anonymous jury and denial of a hearing on the issue. The rehearing petition raised the issue again and was denied in its order of June 19, 1991.

**B. Factual History**

Defendants' convictions of racketeering, extortion and gambling in this case resulted primarily from the fruits of a wiretap on the office of defendant Iacona, which was in place from September 23 through December 23, 1986. Through this wiretap, the jury was provided with evidence showing that the defendants, except Idone, were actively involved in leasing and servicing 23 videopoker machines which were used for gambling in bar/restaurants in the area of Chester, Delaware County, Pennsylvania. Iacona owned and ran this business, known as Star Vending and Eufrasio and Peticca serviced its machines. An FBI expert testified that Idone had a managerial position based on taped conversations in which he and Iacona spoke of aspects of the business from time to time and he appeared to give advice. No conversation or other evidence indicated any money going to Idone or exercise of control by him as to the gambling business.

The wiretap evidence was corroborated by owners and bartenders who described their own participation and interaction with the three defendants other than Idone. None of them connected Idone with the business.

There were also taped conversations concerning usurious loans and some concerning an incident involving Eufrasio's son, an employee of a competing vending and video poker business, who had removed another competitor's machine from a tavern and was the subject of a criminal complaint by that other vendor. The government charged the defendants with extortion based upon Eufrasio, Sr.'s conversations with Ronald Lee, the owner of the removed machine, about his son's problem.

The evidence separately showed that Idone was a capo in the Scarfo family of La Cosa Nostra. It showed that Eufrasio was an associate of Idone's but not a member of La Cosa Nostra.

Neither of the other defendants was either associated or a member.

No government evidence connected the video poker business with the Scarfo LCN family. Philip Leonetti, Scarfo's nephew and underboss, was a government witness. Leonetti said that Idone simply informed Scarfo that "he was in the loansharking business, the gambling business, extortion business. The poker machines, he told them about them when he went into that business." (Joint Appendix, p. 1110). Leonetti said that Idone also informed Scarfo that Eufrasio was lending money at a casino in Atlantic City and that "he had some loans out." (Joint Appendix, p. 1110). Meetings of Idone and Scarfo occurred before 1982 and in 1986 through 1988 but not between May 1982 and March 1986. The government does not claim that its evidence shows that Idone received any money from any of the activities described in the testimony. Government witnesses named the crew that Idone allegedly managed in connection with his position in the Mafia. None of these people was involved in the video poker business or related activities in Delaware County. None of these crew members was a subject of this indictment.

The relationship between Idone and Scarfo with respect to the video poker business is described in negative terms by the government witness, Leonetti, who said: "Well, my uncle never really wanted to bother him [Idone]. He never wanted anything from him." (Joint Appendix, p. 1145).

The only money given by Idone to Scarfo was bribes from contractors seeking union accommodations through Scarfo. No money was given by Idone to Scarfo related to any of the charges in the indictment.

The superseding indictment added no new counts to the original charges but only charged a new predicate offense in the racketeering counts, that Idone conspired with government

witnesses Philip Leonetti, Thomas DelGiorno, Eugene Milano and others of the Scarfo organization, to find and murder Thomas Auferio in the Fall of 1983. The evidence on this charge described an episode in the Scarfo-Riccobene wars which lasted from the spring of 1982 until December, 1983, when this intra-Mafia warfare ended. It alleged two conversations in which Idone participated in a club in Philadelphia. In the first one he was asked if he could have one member of his crew who lived in Hazelton, Pennsylvania, locate Thomas Auferio, a Riccobene partisan who was believed to have fled and hidden in Hazelton, and a second conversation in which Idone reported that he had been informed that Auferio was not in Hazelton but that if he was found there he would be killed.

Auferio survived the war and later died of natural causes. This allegation and the testimony supporting it involved Idone with various members of the Scarfo Mafia family. It did not relate to any of the other defendants in the indictment. None of the other defendants appears to have been aware of its occurrence. It happened three years before the events forming the basis for the rest of the charges. It happened in a different county with different persons for different purposes. This conduct was in no way related to the video poker enterprise that was the core of the remaining charges.

In addition to its own murderous content, the predicate acts relating to the Auferio murder conspiracy provided a sluicegate for the introduction of the story of the Scarfo-Riccobene warfare with 13 murders, attempted murders, ambushes, extortions, assaults, corruption, etc. and the criminal autobiographies of the government witnesses, Leonetti, DelGiorno and Milano, all of whom were Scarfo family defectors. All of the defendants complained of the prejudicial impact of the Scarfo family evidence, thus introduced on the basis of the superseding predicate acts. The Court of Appeals found this was not error.

## REASONS FOR GRANTING THE WRIT

### I.

**Refusing to allow voir dire questioning about the identity, addresses and employment of jurors, which is not based on any evidence of need for safety measures, or on any fact-finding by the trial judge, presents an important issue in the administration of federal criminal law which implicates a defendant's right to trial by jury.**

The use of anonymous juries is a fairly recent phenomenon. While the roots of this practice can be traced to *Johnson v. United States,* 270 F.2d 721 (9th Cir. 1959), *cert. denied,* 362 U.S. 937 (1960) and *Wagner v. United States,* 264 F.2d 524 (9th Cir.), *cert. denied,* 360 U.S. 936 (1959), it was not until *United States v. Barnes,* 604 F.2d 121 (2d Cir. 1979), *cert. denied,* 446 U.S. 907 (1980) that a federal court approved an anonymous jury where the names, addresses, ethnic backgrounds and religion of the jurors were not disclosed.

The critical fact favoring anonymity in *Barnes,* was the sordid history of witness intimidation and jury tampering in earlier trials of large-scale narcotics distribution rings. The *Barnes* court speculated that juror anonymity would promote impartial decision making since it allayed the jurors' fears of retaliation against themselves and their families. *See generally, Barnes,* 604 F.2d at 140-143.

*Barnes* was revisited in *United States v. Thomas,* 757 F.2d 1359 (2d Cir.), *cert. denied,* 474 U.S. 819 (1985) which rejected defense arguments that the restrictions on voir dire denied defendants due process by preventing intelligent exercise of peremptory challenges. The *Barnes* court viewed juror anonymity as an accommodation to the realities of modern day trials in large

narcotics cases which have created serious problems for the courts in large cities. *Barnes*, 604 F.2d at 142, 143.

The *Thomas* court raised the due process issues:

> Although most attacks on this practice have been on Sixth Amendment grounds, concealment of a witness's identity probably affects the jurors' opinion of a defendant, and thereby implicates Fifth Amendment due process in much the same way as would a judge's instructions to jurors not to reveal *their* own names . . . [A]lthough the presumption of innocence is of significant importance, and is protected by the due process clause of the Fifth Amendment, there is no *per se* rule that it may not be burdened.

*Thomas*, 757 F.2d at 1364.

*Thomas* warned that "the practice of impanelling an anonymous jury is [not] constitutional in all cases" absent (1) strong reason to believe the jury needs protection and (2) reasonable precautions to reduce the adverse effect that such a decision might have on the jurors' opinions of the defendants. *Id.* at 1365.

> The trial judge examined the specific facts of this case, received evidence and arguments, and determined that the jury deserved protection. He gave the jury an intelligent, reasonable and believable explanation for his actions that did not cast defendants in an unfavorable light. The significance of this reasoned explanation . . . is that it minimized the potential for prejudice to defendants.

*Id.* at 1364.

Here, however, the anonymous jury was empaneled without these procedural safeguards and this has been approved by the Third Circuit contrary to the Second Circuit's position and its own earlier view.

In *United States v. Scarfo,* 850 F.2d 1015, 1021 (3d Cir.), *cert. denied,* 488 U.S. 910 (1988), the court had confronted similar defense objections, including (1) impairment of the intelligent exercise of peremptory challenges and (2) compromising the presumption of innocence. To measure these interests against the need for juror safety, the *Scarfo* court found that the trial judge

> heard testimony during pretrial proceedings that, if believed by the jurors, might well have caused them to be apprehensive — not only for their own safety but, perhaps more acutely, for the safety of their families.

*Scarfo,* 850 F.2d at 1023.

Although the *Scarfo* court relied on *Thomas* it did not specifically require the hearing approved in *Thomas.*

Despite the absence of any hearing or fact-finding or evidence of danger to jurors, the Court of Appeals affirmed the use of the anonymous jury, based on *Scarfo.*

In *Scarfo,* it speculated that anonymity dispelled jurors' fears for their own safety thus promoting impartial, dispassionate jury verdicts despite its expressed belief that "predicting jurors' responses to the anonymity practice is pure speculation." *Scarfo,* 850 F.2d at 1028.

The court below rejected petitioners' argument that trial courts must hold evidentiary hearings on jury safety and must record their reasons when ordering anonymous juries. The Third Circuit now rereads *Scarfo*, saying: "The record in *Scarfo* indicate[d] the trial court only heard oral argument on the anonymous jury issue, not a full hearing with factfinding." (Appendix A, 43a). It stated that "[a] trial court has discretion to permit an anonymous jury without holding an evidentiary hearing on juror safety, if the court believes there is potential for juror apprehension" concluding that "the trial court did not abuse its discretion in ordering the anonymous jury in this case." (Appendix A, 43a).

The Third Circuit gives trial courts carte blanche in empaneling anonymous juries. Trial judges may now consider the ambience surrounding the trial and its potential for juror apprehension based only on the charges and the press. In the case below, the trial court considered publicity surrounding a 1988 Scarfo family racketeering prosecution which the Third Circuit believed could have raised juror apprehensions for their safety in 1990 despite the record facts that at the time of petitioners' trial, the defendants in the previous trials were all in jail and some were cooperating with the government (Defense Answer, p. 3, Joint Appendix, p. 183) and that there was very little publicity regarding petitioner's case. Actually, the newspaper accounts appended to the government's motion for an anonymous jury indicate the jurors had nothing to fear, that the Scarfo crime family was in ruins.

The population growth of urban metropolitan areas results in anonymity without any judicial intervention. As persons become increasingly anonymous, one to another, the solemnity of the jury's felt responsibility diminishes because city jurors deal with relative strangers rather than known members of the community in which they live.

The vicinage notion included in the constitutional right to trial by jury implies a defendant's right to be tried by jurors with whom he has some community ties. Anonymity is at odds with this ingredient of the constitutional right to trial by jury.

Anonymity is also at odds with the right to make a serious effort to test the impartiality of jurors. Anonymity facilitates hidden prejudices, bias and indifference to the fate of the defendants entrusted to a juror's care.

The decision below evidences no concern for the obligation to supervise a district court's jury selection procedure even in the slightest degree.

## II.

**The introduction of a conspiracy-to-murder racketeering act which is different in purposes, results, participants, time, place, victims and methods of operation from the other charged predicate acts presents this Court with the opportunity to define the outer bounds of RICO's "pattern."**

The opinion below presents an important question on the meaning of the RICO pattern requirement first addressed by this Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989). The Third Circuit says that *H.J.* permits the inclusion of unrelated predicates in a pattern, *i.e.*, predicates which do not share the similarities required by this court in *H.J.* where the enterprise exists for entirely criminal purposes.

It held below:

> . . . when a proven organized crime entity like the Scarfo Family is the relevant enterprise in a RICO

> case, the relationship prong of RICO's pattern requirement is satisfied by functionally unrelated predicate acts and offenses, if the predicates are undertaken in association with, or in furtherance of criminal purposes of the same organized crime enterprise.

(Appendix A, 22a).

In such a case, the relationship of all the predicates to the enterprise will suffice to show relatedness to each other even though the *H.J.* requirement is not otherwise met.[2]

Such a reading of *H.J.* poses a significant interpretive question which was not fully explained in the opinion below, that is whether allowing relatedness to the enterprise to do service for relatedness to each other of the predicates actually eliminates either the pattern relatedness requirement or the requirement, as a separate element of the offense, that one participate in the affairs of the enterprise through his pattern of racketeering activity.

The pattern requirement of RICO consists of two separate elements: a relatedness between the predicate acts and continuity or threat of continuity of racketeering activity. Thus, "continuity plus relationship" combines to produce the pattern. *H.J.*, 492 U.S. at 239 (quoting 116 Cong. Rec. at 18940). The uniformly accepted reading of the congressional text compels the observation of this Court that Congress required both a pattern (relatedness and continuity) and that the pattern constitute the means by which the defendant participated in the affairs of the charged enterprise, in order to satisfy the demands of the language of 18 U.S.C. § 1962(c).

---

2. This view is at variance from the First Circuit's opinion in *United States v. Boylan*, 898 F.2d 230 (1st Cir.), *cert. denied*, 112 L. Ed. 2d 106 (1990).

This Court, in *H.J.*, adopted the same pattern requirement which Congress included in Title X, the Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575, *et seq. Id.* "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e).

The lower court makes an exception to this requirement in the case of La Cosa Nostra or other exclusively criminal enterprise, holding that relatedness to the enterprise will suffice to show relatedness of the predicates to each other. In practice, this means that if a defendant who is associated with the enterprise commits the predicate offenses, the predicates are all thereby related regardless of their dissimilarity, diversity and isolation.

In this case, the Court of Appeals agreed that the government's evidence showed the defendants ran a video poker business combined with money-lending and extortion unrelated to the Scarfo family. They did this in Chester, Pennsylvania in the Fall and Winter of 1986, based upon evidence from FBI wiretaps at the Iacona Auto Center from September through December 1986. This was the entire original indictment.

But for Idone's Mafia membership, there was no evidence that the 1986 video poker and related activity was a Scarfo family business. No money from the video poker and related 1986 activities in Chester, Pennsylvania went to Scarfo. There was no evidence that Santo Idone, himself, received money from this activity. Philip Leonetti, Scarfo's nephew and former underboss, testified that Idone let Scarfo know what he was doing in the event Idone had a problem. This information was given to Scarfo by Idone since "it would be embarrassing for my uncle not to know what he's doing." According to Leonetti, Idone simply told

Scarfo the generic character of the business: loansharking, extortion and poker machines. Leonetti proved that Scarfo received no money from this activity. His testimony, consistent with all the government evidence, made it clear that this was not a Scarfo family business. Neither petitioner Eufrasio nor the other two defendants were members of the LCN.

In the superseding indictment the government added the 1983 murder conspiracy against Idone only. The conspiracy evidence comprised two conversations which Idone had with unindicted Scarfo family members, Philip Leonetti, Eugene Milano, Thomas DelGiorno and Philip Testa. These two conversations, in which Idone was asked to help find Tommy Auferio and in which he later reported back that he was unable to do so, constitute the Auferio murder conspiracy. It was evidenced only by those two meetings in September or October, 1983 with the four named Scarfo family members. This mini-conspiracy was part of the effort by Scarfo to restore discipline in his organization. The conspiracy involved none of the other defendants in the case at bar, nor did it have a relation to the purposes, the time and location, the functions, or the activities charged in the 1986 video poker and related charges.

The issue boils down to whether Idone, a Mafia capo, can provide the relatedness of otherwise unrelated criminal activity for the purpose of forming a pattern within the meaning 18 U.S.C. § 1962(c). If this question is answered in the affirmative, the next question is whether the one Mafia-related predicate and the remaining predicates are sufficient to establish the nexus between the pattern and the enterprise, which in this case was the Scarfo crime family.

Otherwise stated, the problem is whether one Mafia member (Idone) can serve as the link by which disparate and functionally unrelated acts are deemed to be in furtherance of the affairs of

an enterprise. Can the extracurricular activities of the one Scarfo family member be called part of a pattern merely because of his status.

A conviction under 18 U.S.C. § 1962(c) requires both a pattern or related predicate crimes and a defined relationship of that pattern to the enterprise. The interrelatedness of offenses is the pattern-relatedness described in *H.J., Inc.*, but the enterprise nexus is required by the statutory element that defendant participate in the affairs of the enterprise by the charged pattern of racketeering activity. This has been defined to mean that a defendant's position with the enterprise was what enabled him to carry out the pattern of activity. *United States v. Pungitore*, 910 F.2d 1084, 1104 (3d Cir. 1990). This enterprise relationship should not be confused with the interrelationship of the acts in a series alleged to constitute the pattern, *i.e.*, the similarity of purpose, participants, time, place, victims and method of operation.

There is danger in a rule which says that a Mafia capo or any other member of a criminal enterprise can provide the relatedness of otherwise unrelated criminal activity to form the pattern. The danger is two-fold:

(1) Such a view telescopes the two different types of relationships, which are separate elements of the crime required by the statutory language. Such a rule substitutes relationship to the enterprise for interrelatedness as a series of criminal acts forming the pattern. Congress made clear that the two separate relationships must be proved. It impoverishes both concepts to permit one to do service for the other;

(2) It is especially unlikely that Congress would have intended that the American Mafia, which was at least one prime target of the RICO statute, be subjected to a simpler, less exacting

definition of RICO pattern than other enterprises. Congress emphasized individual, not group liability, in fashioning RICO. The mere fact that a given agglomeration of criminal acts has a Mafia member as a participant does not convert such miscellaneous acts into a pattern for RICO purposes. The Third Circuit does not point to any judicially noticeable characteristics of the mafia that allow a court to say Congress intended that a Mafia-related prosecution be proved by definitions different from any other RICO case.

In view of the established fact, noted by this Court in *H.J., supra, United States v. Turkette,* 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) and other cases, that the Mafia was in the forefront of Congress' mind when the statute was written, and each of statutory requirements, including pattern and participation, were enacted, it is surprising that the court should find Mafia enterprises to be an exception. The Mafia was the core prototype case to which Congress intended RICO to be applied.

The dissent in *H.J.* and commentators' writing since that decision have expressed concern about the breadth of its definition of pattern and the instant decision seems to expand the definition substantially beyond the terms accepted by the majority of this Court in *H.J.*

We present a core issue in the interpretation of 18 U.S.C. § 1962(c) in both criminal and civil cases. Predictably, the decade of the 90's will generate even more prolific litigation than the 80's in civil and criminal RICO, with both prosecutors and plaintiffs' lawyers pushing the limits of this Court's definition of pattern and relationship to the enterprise as well. Both types of litigation are affected by the enlargement of the pattern to include anomalous predicates and the merger of relatedness and relationship to the enterprise. It takes little prescience to anticipate

that both prosecutors and plaintiff's litigators will seek Mafia counterparts or analogues as to whom sufficient misconduct is attributable to base the argument for dispensing with the need for relatedness of the RICO predicates, so long as they are all related to the enterprise, or to some defendant who has a connection with the enterprise.

We suggest that the issue needs careful consideration and that the court below has opened the door to a broad-ranging application of RICO to activities not literally within this Court's definition of pattern.

## CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court issue its writ of certiorari to the Court of Appeals for the Third Circuit to review the instant decision.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 15, 1991**

Filed May 15, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1267

UNITED STATES OF AMERICA

V.

MARIO EUFRASIO, a/k/a Murph,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 89-00021-02)

No. 90-1268

UNITED STATES OF AMERICA

V.

SANTO IDONE, a/k/a Sam, a/k/a Sam from Chester, a/k/a Papa, a/k/a Big Santo,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 89-00021-01)

No. 90-1305

*Appendix A*

UNITED STATES OF AMERICA

V.

GARY S. IACONA,

Appellant

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On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No.89-00021-03)

---

Argued October 11, 1990

Before: GREENBERG, HUTCHINSON and NYGAARD, *Circuit Judges*

(Opinion Filed May 15, 1991)

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*Appendix A*

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---

**OPINION OF THE COURT**

---

NYGAARD, *Circuit Judge*.

In these consolidated criminal appeals, appellants Santo Idone, Mario Eufrasio and Gary Iacona stand convicted and sentenced for RICO violations, attempted extortion and illegal gambling. Appellants were charged together and tried jointly before an anonymous jury.

The jury found each defendant guilty on four counts: conspiring to participate, and participating in the affairs of an enterprise through a pattern of racketeering activity and the collection of unlawful debt in violation of 18 U.S.C. § 1962(d) and (c) (counts one and two) (the "RICO counts")[1]; attempted extortion in violation of 18 U.S.C. § 1951 (count three); and conducting an illegal gambling business in violation of 18 U.S.C. § 1955 (count four).

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1. 18 U.S.C. § 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d) makes it unlawful for any person to conspire to violate any provision of § 1962(c).

*Appendix A*

Appellants' RICO liability was predicated on attempted extortion, illegal video poker machine gambling and collecting unlawful debts. Only Idone was charged with and convicted on a separate racketeering predicate of murder conspiracy.

All appellants allege the following errors: with respect to the RICO counts, the superseding indictment failed to charge a valid pattern of racketeering activity; evidence of uncharged crimes was admitted without adequate limiting instructions and without articulating Fed. R. Evid. 403's probaty/prejudice balance; the district court empaneled an anonymous jury without a hearing and without stating its reasons on the record; and, various insufficiencies of evidence warrant reversal of appellants' convictions.

Eufrasio and Iacona argue the trial court erred by not severing their trials from Idone's trial when only Idone was indicted under RICO on the murder conspiracy predicate, evidence of which allegedly prejudiced Eufrasio and Iacona. Additionally, they argue the extortion count of the superseding indictment was ambiguous, and so the trial court erred by denying a requested bill of particulars and curative jury instructions. They also claim the district court's charge to the jury concerning appellants' collection of unlawful debts was inadequate.

Individually, Eufrasio appeals the government's failure to corroborate certain tape recorded statements made by him, and failure to prove he engaged in a "continuous" business of making usurious loans. Iacona argues it was error not to require the government to prove appellants made threats when collecting unlawful debts. Idone contends it was error not to dismiss the murder conspiracy charge from his trial, or alternatively,

to sever the RICO counts from his trial on the other charges.[2]

We reject each of appellants' claims on appeal, and will affirm their convictions. We have appellate jurisdiction under 28 U.S.C. § 1291.

I.

*Facts*

Viewed in a light most favorable to the government, trial evidence showed that during 1982 and 1983, Idone participated in the affairs of an organized crime enterprise through a murder conspiracy; and that during 1981-1986, all appellants conspired to and did participate in the same enterprise through a pattern of illegal gambling and the attempted extortion of a competitor of their gambling business, and through the collection of unlawful debts.[3]

A. The Nature of the Scarfo Enterprise.

From 1981 to 1986, appellants conspired to participate, and participated knowingly in the Scarfo "Family," a Philadelphia and New Jersey based subdivision of La Cosa Nostra ("LCN" or

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2. Pursuant to Federal Rule of Appellate Procedure 28(i), appellants adopted each other's briefs and arguments in several respects. Since we reject all of appellants' allegations of error, we need not enumerate here who adopted what.

3. RICO liability may be predicated either on a "pattern of racketeering activity", or alternatively, upon the "collection of unlawful debt". *See* 18 U.S.C. § 1962(c). A pattern of racketeering activity "requires at least two acts of racketeering activity", 18 U.S.C. § 1961(5), which by definition includes acts or threats involving murder, extortion and gambling. *See* 18 U.S.C. § 1961(1).

"Mafia").[4] At times relevant to appellants' convictions, the Scarfo organization was a RICO "enterprise"[5] consisting of approximately 60 full members of the LCN, and at least 100 criminal associates. Appellants' participation in Scarfo-related criminal activities resulted in their RICO convictions.

The Boss of the Scarfo enterprise, Nicodemo Scarfo ("Scarfo"), oversaw its activities, and appointed lesser mob officers. Below the enterprise's top leadership were "Capos" (captains), each of whom commanded a "crew" of criminal "soldiers" and "associates". The enterprise's top leadership, Capos and soldiers were "made men", that is formally initiated members of the LCN. Associates were uninitiated colleagues of Mafia soldiers, and were responsible to their sponsoring LCN member.

Associates and soldiers were required by mob rules to obtain their superiors' approval before conducting criminal ventures, and had to report their criminal activities and profits to these superiors. Capos supervised their crews and shared in the proceeds of crew crimes along with the enterprise's top leadership.

Idone was a "made" member of the LCN who, beginning in the early 1970's, served as a Capo in the Scarfo organization. During the period

4. The LCN or Mafia is an nationwide organized crime syndicate with local subdivisions, such as the Scarfo enterprise. For a more detailed account of this organization, *see United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990).

5. A RICO "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

1981-1986, Idone supervised a crew of soldiers and associates, including Eufrasio and Iacona. Idone's crew participated in the crimes at issue here: the conspiracy to murder Thomas Auferio; the illegal video poker machine gambling business; the attempt to extort competitors of that business; and the collection of unlawful debts. As required by Mafia rules, Capo Idone periodically reported his crew's criminal activities to his Boss, Scarfo.[6] Eufrasio regularly arranged meetings with Scarfo to facilitate Idone's reporting.

The function of soldiers and associates, and of the mob generally, was to make money by illegal means. More specifically, the enterprise's diverse purposes were "to control, manage, finance, supervise, participate in and set policy concerning the making of money through illegal means." App. 43.

B. Idone's Participation in the Enterprise-related Conspiracy to Murder Thomas Auferio.

To enforce mob discipline in 1982, Scarfo ordered Idone and other Capos to kill Harry Riccobene and his supporters. Riccobene was an insubordinate member of the Scarfo organization. Thomas Auferio, a Riccobene supporter, was also targeted for murder. Idone participated in the ensuing conspiracy to murder Auferio. Idone's participation in that conspiracy was racketeering activity constituting, in part, the pattern of racketeering underlying Idone's RICO convictions.

Scarfo's Capos attempted to murder Riccobene more than once during the summer of 1982, but botched the job each time. Scarfo complained to

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6. Idone also shared criminal profits with Scarfo, but not with respect to all the crimes at issue in this appeal.

Idone and another Capo, Philip Leonetti. Although subsequently incarcerated, Scarfo continued efforts to kill Riccobene and his supporters.

In early fall 1983, an attempt to kill Riccobene affiliate Thomas Auferio failed. Auferio went into hiding, apparently in Hazelton, Pennsylvania. Scarfo people met with Idone and asked him to help locate Auferio. Idone agreed to have a member of Idone's crew who lived in Hazelton, assist in the hunt for Auferio. A week later, Idone and the other would-be murderers met again. At this meeting Idone said Auferio was no longer in Hazelton, but Idone would have his crew members kill Auferio if they found him.

Eventually, the Scarfo faction succeeded in killing some Riccobene followers. As a result, the efforts to locate and kill Auferio were called off.

C. Appellants' Participation in the Enterprise-related Illegal Gambling Business.

From 1981 until December 1986, Idone, Iacona, Eufrasio, Francis Peticca (a co-defendant who did not appeal his conviction) and others, conducted an unlawful video poker machine gambling business. Appellants placed illegal gambling machines in restaurants and bars throughout Delaware County, Pennsylvania. Delaware County is adjacent to Philadelphia, a center of Scarfo activities. Appellants' illegal gambling was a direct violation of 18 U.S.C. § 1955,[7] and also was

7. 18 U.S.C. § 1955 reads, in part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which ... is a violation of the law of a

racketeering activity constituting, in part, the pattern of racketeering underlying appellants' RICO convictions.

Through electronic surveillance of Iacona's Auto Center in Chester, Pennsylvania, the FBI intercepted appellants' conversations about their illegal gambling operations. As a result, in December 1986, FBI agents executed search warrants and seized numerous video poker machines and cash gambling proceeds from 21 Delaware County bars and restaurants. A contemporaneous raid of the auto center discovered Iacona, Eufrasio, Idone and Peticca on the premises with more of their video gaming machines, thousands of dollars in cash, gambling records, and Scarfo's address and phone number.

At trial, expert testimony and other evidence showed that appellants had conducted an illegal gambling business involving at least 28 persons and 23 locations; Idone headed that business; Iacona was Idone's partner who worked under Idone by managing day to day gambling activities; and Eufrasio along with Iacona and Peticca, collected gambling revenues and otherwise assisted the illegal gambling operation.

Philip Leonetti, a former LCN member turned government witness, testified that Idone regularly reported to Scarfo on appellants' gambling activities, and also reported the FBI's raid on the auto center. Eufrasio arranged meetings between

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**State or political subdivision in which it is conducted; ... involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and ... has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.**

Idone and Scarfo, in order to assist Idone's reporting. Pursuant to this reporting, and at Idone's request, Scarfo interceded on behalf of Idone in a dispute with the Gambino "Family," a New York subdivision of the LCN, over Idone's gambling operations in Delaware County.

D. Appellants' Participation in the Enterprise-related Attempt to Extort Their Gambling Competitors.

During the period March to December 1986, appellants attempted to extort Action Vending and Automatic Coin Vending Company, with threats and physical violence, in order to deprive Action and its representatives and business associates (including Automatic) of their right to compete with appellants' gambling operation. Action and Automatic were two businesses which associated to install and operate video poker machines in bars and restaurants surrounding Philadelphia, Pennsylvania. Appellants' attempted extortion of Action and Automatic was a direct violation of 18 U.S.C. § 1951,[8] and also was racketeering activity

8. 18 U.S.C. § 1951 provides, in part, as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section – * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

constituting, in part, the pattern of racketeering underlying appellants' RICO convictions.

Action was owned by Alphonse Sanbe. Ronald Lee and Nicholas Sanbe (Alphonse's father) were partners who owned Automatic.[9] Lee (Automatic) and Alphonse Sanbe (Action) agreed that Action would act as Automatic's agent by distributing, installing and servicing Automatic's video poker machines in Delaware County, Pennsylvania and in Wilmington, Delaware. Under this arrangement, Alphonse Sanbe (Action) collected the profits from the gaming machines on behalf of Lee (Automatic).

Under the business arrangement between Action and Automatic, Lee was in charge of placing gaming machines. Lee increased placements in Delaware County by providing incentives, including low interest loans and monetary bonuses, to bar and restaurant owners. This strategy competed with and frustrated appellants' gambling operations, and gave rise to appellants' attempted extortion of Action and Automatic.

The attempted extortion was triggered after Lee placed a poker machine in the Gold Room, an establishment in Chester, Pennsylvania. The Gold Room had given Lee an exclusive right to place machines on the premises, but in mid-1986, Lee learned that appellant Eufrasio's son, Danny Eufrasio, had taken one of Lee's machines out of the Gold Room and replaced it with one of appellants' poker machines. Lee responded by having his partner, Nicholas Sanbe, file a complaint against Danny Eufrasio with the Chester Police Department.

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9. Lee was the 91% owner of Automatic.

A few days later, appellant Eufrasio telephoned Lee and told him to drop the police complaint because "it wasn't worth somebody getting hurt over", and Lee was "fooling with the wrong people". App. 1915. Lee knew Eufrasio was involved with Capo Idone, and "understood that if [he, Lee] didn't drop these charges, that [he] was going to get hurt". App. 1917. Lee took Eufrasio's threats seriously and started to carry a gun.

Intercepted telephone conversations between Idone, Iacona and Peticca reveal that they conspired to threaten Action and its business associates with physical injury. A September 1986 conversation indicates Idone and Iacona believed that Alphonse Sanbe damaged some of appellants' poker machines, and that appellants should therefore "grab" either Alphonse Sanbe or Herman Fontaine (one of Action's employees) and threaten or inflict physical injury, in order to deter Alphonse Sanbe's and Action's competition with appellants' gambling machine business. App. 3648-49; 3657-58.

Nevertheless, appellants' concluded that, lest they provoke an FBI investigation of themselves, they should not directly carry out the proposed threats or physical violence, but if possible, should enlist Frederick Lupi for the job. Lupi was an associate of Alphonse Sanbe's, soon to be released from jail. Appellants agreed it would be better for Lupi to carry out any threats or physical violence against Alphonse Sanbe.

Idone and Iacona did meet with Lupi. But according to Iacona's intercepted description of that meeting, appellants' plan to enlist Lupi fell far short because Idone, accompanied by Iacona, threatened Lupi himself. At the meeting, Lupi signalled his interest in one particular gaming

machine controlled by Action and Automatic, and in competing with Idone's gambling operation generally: Lupi told Idone that Danny Eufrasio had taken Lupi's machine from the Gold Room; that Idone should return the machine; and that Lupi had discussed the Gold Room dispute with the Gambino organization. Lupi added, however, that he had instructed Alphonse Sanbe and his associates not to go to court on the police complaint against Danny Eufrasio. Idone responded forcefully to Lupi, telling him the New York Mafia people had to see Idone before they could direct Lupi to work gambling machines in Delaware County.

Later, appellants discussed among themselves the competition posed by Action and Automatic, and the relationship between Action and Alphonse Sanbe. Eufrasio said appellants "have trouble with Automatic Vending which is ... Nick Sanbe ... and Ronnie [Lee]." App. 4049. Appellants' intercepted conversation indicates they knew Automatic and Action were affiliated businesses. Idone said that appellants must stop Nicholas Sanbe from creating incentives for bars and restaurants to replace appellants' gambling machines; and that appellants should return Action's Gold Room machine so that the criminal complaint filed against Danny Eufrasio would be dropped.

On December 2, 1986, Idone told Eufrasio, Iacona and Peticca that if "they [Action and Automatic] gonna start the fight we'll leave the poker machine ... If it's possible we work things out. But then if we don't ... you gotta use other methods that's all." App. 4090-91. Idone instructed his co-conspirators to accumulate more information about their competitors, adding that "then we can ... beat up the one guy." App. 4091.

Less than a month later, appellants discussed the fact that Alphonse Sanbe (Action) had agreed to take out a machine he had placed in an establishment called the Peppermill.

E. Appellants' Enterprise-related Collection of Unlawful Debts.

Expert testimony, appellants' own intercepted conversations, and other trial testimony and evidence proved that appellants collected unlawful debts[10] on numerous usurious loans. These collections are an alternative basis of appellants' RICO convictions.[11]

During the period September to December 1986, appellants and their cohorts collected debts on numerous loans, some with effective annual interest rates ranging from 78% to 283%. One witness testified that he borrowed $4500 from Iacona for twelve weeks, paying interest totalling $540 during that period.

Idone and Iacona were partners who supplied capital and authorized the illegal loans, while

10. 18 U.S.C. § 1961(6) provides:

> "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

11. A violation of 18 U.S.C. 1962(c) requires participation in the conduct of a RICO enterprise's affairs through a "pattern of racketeering activity" or the "collection of unlawful debt".

Eufrasio acted as their agent in the unlawful lending racket. As required by Scarfo enterprise rules, Idone reported his crew's loansharking activities to Scarfo, and also told Scarfo that Eufrasio loaned money on behalf of Idone in Atlantic City, New Jersey. Eufrasio knowingly assisted in scheduling this reporting to Scarfo.

F. Procedural History.

Originally, appellants and their fourth co-defendant, Peticca, who does not appeal, were charged in a four count indictment with racketeering, racketeering conspiracy, extortion and illegal gambling. This indictment charged that appellants conspired to and did associate with the Scarfo enterprise through a pattern of racketeering activity occurring over the period 1982-1986. The pattern of racketeering charged against each appellant consisted of extortion and illegal gambling. This original indictment also charged each appellant with collecting unlawful debts, an alternative basis of RICO liability.

Eight months later, the government returned another indictment against appellants. This superseding indictment enlarged the pattern of racketeering activity alleged in the original indictment, by charging an additional racketeering predicate against Idone only: he was charged with participating in the Auferio murder conspiracy. The Auferio murder conspiracy, Racketeering Act One in the Superseding Indictment, is the distinguishing difference between the two indictments. Charging the Auferio murder conspiracy as a racketeering predicate resulted in other differences between the two indictments, but generally speaking, the two indictments are the same but for the murder conspiracy charge against Idone. Both indictments alleged appellants

conspired to and did in fact participate in the affairs of the Scarfo enterprise through a pattern of racketeering activity and collecting unlawful debts. Despite the similarities, however, the superseding indictment charged Idone *alone* with the murder conspiracy predicate.

Before trial, Idone made a motion in the alternative under Fed. R. Crim. P. 8 and 14, to either dismiss the murder conspiracy predicate alleged against him, or to sever his trial on the RICO counts (which incorporated the murder conspiracy predicate) from his trial on the two non-RICO counts (extortion and illegal gambling). Idone's motion was denied.

The trial court also denied Eufrasio's and Iacona's pretrial motions to sever Idone's trial from their own, and for a Bill of Particulars on the extortion count. After granting the government's motion for an anonymous jury, the trial court tried appellants jointly.

II.

*Satisfaction of RICO's Pattern Requirement*

Each appellant claims that the superseding indictment was flawed because its RICO allegations did not satisfy RICO's pattern requirement. Appellants argue that the murder conspiracy predicate charged against Idone *and* the other charged racketeering predicates do not form a single "pattern of racketeering activity", because the Auferio murder conspiracy was not alleged to involve the same or similar purposes, results, participants, victims or methods of activity associated with the alleged gambling and extortion predicates. Appellants made pre-trial motions to dismiss on this ground.

Appellants' arguments force us to address the meaning of a "pattern of racketeering activity", specifically, the requirement that there be some *relationship* between racketeering predicates forming a RICO pattern. Our review is plenary because it requires construction of 18 U.S.C. § 1962(c). *Universal Minerals, Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981).

Section 1962(c) provides as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a *pattern of racketeering activity* or collection of unlawful debt.

(Emphasis added.) Since Congress has not provided a complete definition of RICO's "pattern of racketeering activity" requirement, *see H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 2899 (1989), we have been forced to develop the concept with case-by-case analysis. We must decide here whether the Auferio murder conspiracy was a racketeering predicate legally related for RICO purposes to the other predicate acts charged in the superseding indictment.

At the outset, we note that our decision as to whether all the predicates charged in this case form a single pattern of racketeering activity can potentially benefit only Idone. Eufrasio's and Iacona's RICO convictions do not depend at all on the propriety of charging the disputed murder conspiracy predicate, but rather exclusively on the gambling and extortion predicates charged against them in the superseding indictment.[12]

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12. Appellants' RICO convictions also rest on their collection of unlawful debts, which substitute for a showing that appellants engaged in two or more predicate acts forming a pattern of racketeering activity. *See* 18 U.S.C. § 1962(c).

It follows that we need not reverse Eufrasio's and Iacona's RICO convictions if there was sufficient evidence from which the jury could have concluded that they committed the predicate offenses of gambling and extortion charged against them.[13] Since we hold there was sufficient evidence of the gambling and extortion predicates charged against Eufrasio and Iacona, *see* below, pp. 51-54, and because they were not charged with participating in the Auferio murder conspiracy.[14]

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13. *See, similarly, United States v. Brown*, 583 F.2d 659, 669-70 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979), holding that if a jury convicts a RICO defendant on multiple predicates and it cannot be determined which specific offenses the jury relied upon in reaching its verdict, such that the jury may have relied upon predicate offenses not supported by sufficient evidence, the racketeering conviction must be reversed despite the fact that two of the potential predicate offenses still constituted valid bases for the verdict. *Compare United States v. Riccobene*, 709 F.2d 214 (3d Cir.), *cert. denied*, 464 U.S. 849 (1983), holding that "*Brown* does not require that we reverse the convictions of any defendant when there is sufficient evidence from which the jury could have concluded that he did commit every predicate offense charged against him. *Nor does it require reversal when the reviewing court can determine that the jury did not rely on the challenged predicate offense when reaching its verdict on the RICO charge.*" *Id.* at 228 (emphasis added).

14. The superseding indictment charged the defendants in this case with predicate racketeering acts as follows (App. 54):

| *Defendant* | *Racketeering Act # and Description* |
|---|---|
| SANTO IDONE | #1 Conspiracy to commit murder |
| | #2 Hobbs Act Extortion |
| | #3 Leasing, Setting Up, and Maintaining Devices for Illegal Gambling |
| MARIO EUFRASIO | #2 Hobbs Act Extortion |
| | #3 Leasing, Setting Up, and Maintaining Devices for Illegal Gambling |

the jury's verdict against Eufrasio and Iacona stands irrespective of whether the Auferio murder conspiracy predicate was properly charged against Idone.

The impact on Eufrasio and Iacona of our inquiry into RICO's pattern requirement aside, we hold that the Auferio murder conspiracy was properly charged against Idone because it was a racketeering predicate legally related to the gambling and extortion predicates charged against each appellant. In other words, we decide that all three charged predicates formed a single pattern of related criminal activity for purposes of 18 U.S.C. § 1962(c). Our interpretation of RICO's pattern requirement compels us to reject arguments that the Auferio murder conspiracy was unrelated to the gambling and extortion predicates.

*H.J. Inc.* is the Supreme Court's current pronouncement on RICO's "pattern of racketeering activity" requirement. The Court confirmed a two-prong test of the pattern requirement:

> [T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are *related*, *and* that they amount to or pose a threat of *continued* criminal activity.

*H.J. Inc.*, 109 S.Ct. at 2900 (emphasis added, in part). The Court said 'relatedness' and 'continuity'

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| | |
|---|---|
| GARY S. IACONA | #2 Hobbs Act Extortion |
| | #3 Leasing, Setting Up, and Maintaining Devices for Illegal Gambling |
| FRANCIS PETTICCA | #2 Hobbs Act Extortion |
| | #3 Leasing, Setting Up, and Maintaining Devices for Illegal Gambling |

are "distinct requirements" that must be satisfied in order to establish a RICO "pattern of racketeering activity". *Id.* at 2902. First, charged racketeering predicates must pose a *continuity* of actual or threatened criminal activity. Second, a certain *relationship* must exist among those predicates.

The meaning of the *relationship* prong of RICO's pattern test is at issue here.[15] This prong focuses on the *inter-relationship* of charged RICO predicates. The relationship requirement exists to ensure that RICO is not used to penalize a series of disconnected criminal acts. "A pattern is not formed by 'sporadic activity,' ... and a person cannot 'be subjected to ... [RICO] sanctions ... simply for committing two widely separated and

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15. As for the continuity prong, Idone merely mentions it on appeal, but we decide it was satisfied in this case.

*H.J. Inc.* held that the continuity requirement can be met by showing that related predicate acts or offenses continued over a substantial period of time, posed a threat of continuing criminal activity, or were part of "an ongoing entity's regular way of doing business". *H.J. Inc.*, 109 S.Ct. at 2902. "Thus, the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *Id.*

The predicate acts alleged in the superseding indictment satisfied the continuity requirement because they occurred over the extended period 1981 - 1986; because, as evidenced by the enterprise's history and the Scarfo/Riccobene war, the Auferio murder conspiracy was an instance of the Scarfo enterprise's regular means of conducting criminal business and maintaining its internal discipline; and furthermore, because all the charged predicates were carried out by appellants in their respective roles within Idone's "crew", a component of the Scarfo Family which was a "long-term association that exist[ed] for criminal purposes". *See H.J. Inc.* at 2902.

isolated criminal offenses'". *Id.* at 2900 (quoting from RICO's legislative history, citations omitted).

*H.J. Inc.* noted that "Congress intended to take a flexible approach" to defining a pattern of racketeering activity, and "envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates." *H.J. Inc.*, 109 S.Ct. at 2900. The Court said, "it is ... the relationship that [predicates] ... bear to each other or to *some external organizing principle* that renders them [a pattern]". *Id.* (emphasis added).

The Court also stressed judicial flexibility when it said analysis of RICO's pattern requirement may be guided by Congress' definition of the pattern requirement in the Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575 *et seq.* (now partially repealed), set forth as Title X of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922[16]:

> [C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, *or otherwise are interrelated* by distinguishing characteristics *and are not isolated events*.

*Id.* 109 S.Ct. at 2901, *quoting*, 18 U.S.C. § 3575(e) (emphasis added).

This court of appeals has also spoken about the pattern requirement. In *Banks v. Wolk*, 918 F.2d 418 (3d Cir. 1990), we said "all predicate acts in a pattern must somehow be related to the [same RICO] enterprise." *Id.* at 424. Indeed, we took a very flexible approach to the relationship prong of the pattern requirement, saying

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16. RICO formed Title IX of the Organized Crime Control Act of 1970.

> [W]e should avoid interpreting the relatedness requirement too narrowly.... In organized crime cases, where the RICO enterprise exists solely for criminal purposes, the necessary nexus between the predicate acts and the enterprise will often be enough to satisfy the relatedness requirement.

*Banks*, 918 F.2d at 425. When speaking of the Scarfo enterprise on another occasion, we said,

> [P]redicate acts cannot fairly be characterized as unrelated [when they are] ... committed pursuant to the orders of key members of the enterprise in furtherance of its affairs. Indeed, *the independent existence of [an organized crime] ... enterprise connotes continuity and relatedness* [where] ... the criminal agenda of the enterprise extend[s] beyond the commission of any individual predicate acts....

*Pungitore*, 910 F.2d at 1104 (emphasis added).

Following *H.J. Inc.* and our own cases, we hold that when a proven organized crime entity like the Scarfo Family is the relevant enterprise in a RICO case, the relationship prong of RICO's pattern requirement is satisfied by functionally unrelated predicate acts and offenses, if the predicates are undertaken in association with, or in furtherance of criminal purposes of the same organized crime enterprise. Other courts of appeal agree:

> In some cases both the relatedness and the continuity necessary to show a RICO pattern may be proven through the nature of the RICO enterprise. For example, two racketeering acts that are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise.

*United States v. Angiulo*, 897 F.2d 1169, 1180 (1st Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 130

(1990), *quoting United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir.) (en banc), *cert. denied*, ___ U.S. ___, 110 S.Ct. 56 (1989). Thus, when "racketeering acts [are] ... performed at the behest of an organized crime group," that fact alone belies "any notion that the racketeering acts were sporadic or isolated." *Angiulo* at 1180, quoting *Indelicato* at 1384. *See also United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991) (the question of whether acts of an organized crime entity, as distinct from acts of a lawful enterprise that commits occasional criminal acts, form a RICO pattern "rarely is a problem", because "[t]he business of a criminal enterprise is crime ... [its] crimes form a pattern defined by the purposes of the enterprise").

Our holding is consistent with Congress' main objective in enacting RICO: "the eradication of organized crime", *see H.J. Inc.* 109 S.Ct. at 2903, because it brings the often highly diversified acts of a single organized crime enterprise under RICO's umbrella. Indeed, "[a] criminal enterprise is more, not less, dangerous if it is versatile, flexible, diverse in its objectives and capabilities." *Masters*, slip. op. at 8. Our interpretation of RICO's pattern requirement ensures that separately performed, functionally diverse and directly unrelated predicate acts and offenses will form a pattern under RICO, as long as they all have been undertaken in furtherance of one or another varied purposes of a common organized crime enterprise.

This view of RICO's pattern requirement leads us to conclude it was not reversible error to charge and convict Idone with a racketeering pattern including the gambling and extortion predicates, *and* the Auferio murder conspiracy. The murder conspiracy predicate was, for purposes of the

pattern requirement, legally related to the gambling and extortion predicates, and they to each other, because all were undertaken to further varied and diverse Scarfo enterprise purposes, namely, to control, manage, finance, supervise, participate in and set policy concerning the making of money through illegal means.

Each charged predicate was related one to the other also because each was carried out by Idone or members of his crew, pursuant to orders of "key members of the enterprise", either Idone or Scarfo. *See Pungitore*, 910 F.2d at 1104. Clearly, Idone's participation in the Auferio murder conspiracy was enterprise-related because Scarfo himself ordered the killing in order to enforce mob discipline. Appellants' gambling and extortion activities were mob-related too, because they were illegal means of making money, supervised and controlled by Idone, a Capo in the Scarfo enterprise.

Furthermore, Idone regularly reported on his crew's gambling operations to Scarfo, and this led Scarfo to intercede on behalf of Idone in order to resolve Idone's dispute with the Gambino organization over a Gambino attempt to place gaming machines in Delaware County. To the extent appellants' attempted extortion was undertaken to further Idone's mob-related gambling operations, the extortion itself was mob-related.

We hold that all the predicates charged in this case form a single pattern of racketeering activity satisfying the relationship prong of RICO's pattern requirement. They are all interrelated by a common nexus with the Scarfo enterprise and its diverse criminal purposes: each predicate racketeering act advanced Scarfo enterprise purposes, each was undertaken at the behest of key members of Scarfo's mob, and most were reported directly to Scarfo.

III.

*Rule 8(b) Joinder of Defendants*

Eufrasio and Iacona argue that joinder of their trials with Idone's is reversible error because Eufrasio and Iacona were wholly unconnected with and unaware of the murder conspiracy charged as a racketeering predicate against Idone only. Eufrasio and Iacona allege the joinder of their trials with Idone's prejudiced them because the murder conspiracy alleged against Idone infected the entire trial with evidence of uncharged Mafia crimes and the murder conspiracy itself. They claim the joinder exposed the jury to evidence of numerous mob murders and attempted murders related to the Auferio murder conspiracy and the Scarfo/Riccobene mob war, in which Eufrasio and Iacona did not participate.

Federal Rule of Criminal Procedure 8(b) permits joinder of defendants:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

If joinder is not authorized by Rule 8(b), defendants may not be tried together. *See* 1 C. Wright, *Federal Practice and Procedure* § 144 (2d ed. 1982).

Rule 8(b) provides substantial leeway to prosecutors who would join racketeering defendants in a single trial. The rule permits joinder of defendants charged with participating in the same racketeering enterprise or conspiracy.

even when different defendants are charged with different acts, so long as indictments indicate all the acts charged against each joined defendant (even separately charged substantive counts) are charged as racketeering predicates or as acts undertaken in furtherance of, or in association with, a commonly charged RICO enterprise or conspiracy. *See United States v. Dickens*, 695 F.2d 765, 778-79 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983).[17] "[J]oinder ... of a conspiracy count and substantive counts arising out of the conspiracy [is permitted], *since the claim of conspiracy provides a common link*, and demonstrates the existence of a common scheme or plan." *United States v. Somers*, 496 F.2d 723, 729-730 (3d Cir.) (emphasis in *Somers*, quoting Wright and Miller, *Federal Practice and Procedure*, § 144), *cert. denied*, 419 U.S. 832 (1974).

We agree with the Second Circuit's position that a RICO conspiracy charge provides that required link. *See United States v. Friedman*, 854 F.2d 535, 561 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989). If Rule 8(b) joinder were construed to require a closer relationship between charged acts than is required by RICO's "pattern of racketeering" requirement, joinder might be prohibited in cases where Congress intended it. *Id.*

We review Rule 8(b) joinder *de novo*. *United States v. Somers*, 496 F.2d 723, 729 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974). In determining whether a trial court erred by joining multiple

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17. *See also United States v. Cardall*, 885 F.2d 656, 668 (10th Cir. 1989); *United States v. Friedman*, 854 F.2d 535, 561 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989); *United States v. Caporale*, 806 F.2d 1487, 1510 (11th Cir. 1986), *cert denied*, 482 U.S. 917 (1987); *United States v. O'Malley*, 796 F.2d 891, 895 (7th Cir. 1986).

defendants under Rule 8(b), we focus on the indictment, not on the proof subsequently adduced at trial. *Id.* at 729. As long as the crimes charged are allegedly a single series of acts or transactions, separate trials are not required. *Id.*

Reviewing the superseding indictment in this case, we conclude that charging and proving the Auferio murder conspiracy as a racketeering predicate against Idone, but not against Eufrasio and Iacona, did not preclude Rule 8(b) joinder of all appellants. As we hold above, *see* p. 19, the murder conspiracy and all the other acts charged in this case were related and formed a single pattern of racketeering activity, because each was committed in furtherance of the Scarfo enterprise. There was no Rule 8(b) misjoinder of appellants because, consistent with the law of joinder in RICO cases, all the criminal acts charged against each defendant, including the murder conspiracy implicating Idone, were undertaken in furtherance of a single, commonly charged racketeering enterprise and conspiracy.

IV.

*Eufrasio and Iacona's Rule 14 Severance Motions*

Eufrasio and Iacona claim the district court erred by denying the pre-trial severance motions they made under Rule 14 of the Federal Rules of Criminal Procedure. Eufrasio and Iacona sought to sever the murder conspiracy count charged against Idone.

Rule 14 permits severance of proper Rule 8(b) joinder:

> If it appears that a defendant or the government is *prejudiced* by a joinder of offenses or of defendants in an indictment or information or by

> such joinder for trial together, the court *may* order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

(Emphasis added.) The Rule places the burden of showing prejudice from the joinder on the defendant seeking severance. *United States v. De Peri*, 778 F.2d 963, 983 (3d Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986).

Appellate review of orders denying Rule 14 severance is potentially two-fold. *U.S. v. Sandini*, 888 F.2d 300, 305-306 (3d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1831 (1990). Since denial of severance is committed to the sound discretion of the trial judge, *see e.g., United States v. Reicherter*, 647 F.2d 397, 400 (3d Cir. 1981), we first determine from the record as it was when the severance motions were made, what trial developments were then reasonably foreseeable, and in that light decide whether the court abused its discretion denying severance. *Sandini*, 888 F.2d at 305. While doing so, we keep in mind that a trial court should balance the public interest in joint trials against the possibility of prejudice inherent in the joinder of defendants. *De Peri*, 778 F.2d at 984. Ordinarily, defendants jointly indicted should be tried together to conserve judicial resources. *Sandini*, 888 F.2d at 306. The public interest in judicial economy favors joint trials where the same evidence would be presented at separate trials of defendants charged with a single conspiracy. *De Peri* 778 F.2d at 984.

If we decide the trial court abused its discretion denying severance, we must look to see whether appellants have pinpointed trial prejudice caused by the joinder they sought to avoid. *Sandini*, 888 F.2d at 305. Although a trial judge may have

abused her discretion in denying a Rule 14 severance motion, we need reverse a conviction only if the appellant shows specifically that the denial caused trial prejudice. *Id.* at 305-306, n.2. An appellant's burden is heavy: he must demonstrate "*clear and substantial prejudice* resulting in a *manifestly unfair trial.*" *Reicherter*, 647 F.2d at 400 (emphasis added). "It is not sufficient for [a defendant] ... merely to allege that severance would have improved his chances for acquittal." *Id.* at 307.

With respect to prejudice, "[t]he proper question on appeal is whether the jury could have been reasonably expected to compartmentalize the allegedly prejudicial evidence in light of the quantity and limited admissibility of the evidence." *De Peri*, 778 F.2d at 984. Prejudice should not be found in a joint trial just because all evidence adduced is not germane to all counts against each defendant. *See Sandini*, 888 F.2d at 307. Neither a disparity in evidence, nor introducing evidence more damaging to one defendant than others entitles seemingly less culpable defendants to severance. *United States v. Sebetich*, 776 F.2d 412, 427 (3d Cir. 1985), *cert. denied*, 484 U.S. 1017 (1988).

We hold the trial court did not abuse its discretion by denying Eufrasio's and Iacona's Rule 14 severance motions. Severing Idone's trial was not required, even if some potential for prejudice might be associated with evidence of the Auferio murder conspiracy predicate.

Since Eufrasio and Iacona were jointly indicted with Idone, and all appellants were charged with the same conspiracy to participate in the same Scarfo enterprise, the public interest in judicial economy favored joinder. Common evidence of appellants' gambling and extortion activity and

loansharking, would have been admissible against each appellant in separate trials, as would evidence of the Auferio murder conspiracy which proves the nature, history and means of the enterprise charged against each appellant. Because there would have been substantial overlap in the evidence presented in separate trials, we cannot say the trial court abused its discretion denying Eufrasio's and Iacona's Rule 14 severance motions. The substantial public interest in the judicial economy of a joint trial outweighs the potential for prejudice to Iacona and Eufrasio associated with evidence of Idone's murder conspiracy.

Furthermore, since the Scarfo enterprise was recognized as the underlying criminal enterprise, evidence of other criminal activities engaged in by that organization would have been admitted in separate trials. Indeed, since evidence of the Auferio murder conspiracy could have been admitted as evidence of the underlying RICO enterprise in separate trials, denial of a severance motion which alleged evidence of that crime would cause trial prejudice, cannot be an abuse of discretion.[18]

V.

*Idone's Pretrial Motion in the Alternative*

Idone's pretrial motion under Fed. R. Crim. P. 8 and 14 requested either dismissal of the Auferio murder conspiracy predicate alleged against him

18. Since we hold appellants' Rule 14 motions were properly denied, we need not decide whether Eufrasio and Iacona demonstrated that joinder of their trials with Idone's actually caused them clear and substantial trial prejudice. *See Sandini*, 888 F.2d at 306-307. Nor need we decide whether appellants waived their right to appeal the denial of severance: even assuming appellants preserved the severance issue for appeal, the government prevails under our Rule 14 analysis.

as Racketeering Act One, or in the alternative, severance of Count One (the RICO conspiracy count) of the superseding indictment in its entirety. Idone argues that the district court's denial of this pretrial motion in the alternative was reversible error because Idone's trial on the non-RICO counts was prejudiced by evidence of the Auferio murder conspiracy predicate.

Initially, we must clarify Idone's motion. On the one hand, it sought dismissal of Racketeering Act One (the Auferio murder conspiracy predicate). Alternatively, it asked expressly for severance of *Count One alone* (the racketeering conspiracy count under 18 U.S.C. § 1962(d)), if the district court did not dismiss Racketeering Act One.

In our view, it is not clear whether Idone's motion requested severance of Count Two (the substantive racketeering count under 18 U.S.C. § 1962(c)) and Count Five (the RICO forfeiture count) *along with Count One*, as the alternative to dismissal of Racketeering Act One (the murder conspiracy allegation). It would be illogical for Idone to have requested severance of Count One (RICO conspiracy) only as the alternative to dismissing the murder conspiracy predicate allegation, because Counts One, Two and Five were *all* RICO counts incorporating the Auferio murder conspiracy as Racketeering Act One. The gist of Idone's pretrial motion in the alternative was that the Auferio murder conspiracy allegation, common to all the RICO counts against Idone, was too prejudicial to have been incorporated into or joined with any of the other charges against him. Thus, it seems likely Idone misdrafted his pretrial motion.

In the interests of clarity, we will assume Idone's motion sought to dismiss the murder conspiracy allegation, or in the alternative, to sever *all* RICO counts incorporating it. This does not affect our decision on the merits.

Looking first at Idone's motion "under Federal Rules of Criminal Procedure 8 and 14", *see* App. 105-107, as a motion to *dismiss* Racketeering Act One (the murder conspiracy allegation), we hold the district court did not err denying the motion. In effect, Idone's motion to dismiss challenges the propriety of one element of the superseding indictment. We review challenges to the sufficiency of indictments *de novo*.

Applying this standard, we find no reason why Racketeering Act One should have been dismissed. The Auferio murder conspiracy was charged against Idone as a racketeering predicate. Proof of two or more racketeering predicates were essential elements of the government's RICO case against Idone. *See* 18 U.S.C. § 1962(c). As a racketeering predicate, the Auferio murder conspiracy charge was properly charged, and the district court did not err refusing Idone's request to dismiss it. The government had the right to charge and prove every element constituting the RICO charges against Idone, including the murder conspiracy predicate, even if proof of it revealed unsavory aspects of Idone's criminal past to the jury.[19]

Next, analyzing Idone's pretrial motion as a claim that the RICO and non-RICO counts against

19. We have also taken into account that Rules 8 and 14 authorize joinder and severance of "*offenses*", but not expressly dismissal of *elements* of offenses. Nevertheless, Rule 14 expressly permits a trial court to remedy prejudicial joinder with "whatever ... relief justice requires." Thus, we assume Rule 14 relief might include in some circumstances dismissal of a redundant allegation under one element of a joined offense, if such dismissal (instead of severance of the entire joined offense) would cure prejudicial joinder.

him were misjoined under Rule 8, we will apply the standard of Rule 8(b), which expressly authorizes joinder of *defendants*. Other courts have held that Rule 8(b) applies exclusively to joinder questions in cases, like this one, involving multiple defendants. *See United States v. Kopituk*, 690 F.2d 1289, 1312 (11th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *see generally*, 1 C. Wright, *Federal Practice and Procedure*, 143-144 (2d ed. 1982). They assert Rule 8(a), which expressly authorizes joinder of *offenses*, "applies only in cases involving a single defendant charged with multiple offenses."[20] *Kopituk*, 690 F.2d at 1312. We

20. The standards of Rule 8(a) and (b) joinder are nearly the same. Both permit joinder of offenses and defendants, respectively, when a transactional nexus exists between the offenses or defendants to be joined. Only Rule 8(a), however, permits joinder on an additional theory, that is when offenses "are of the same or similar character":

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged ... *are of the same or similar character* or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 8 (emphasis added).

Theoretically, then, Rule 8(a) provides wider latitude for joinder than does Rule 8(b). Nonetheless, in many cases the focus of joinder of offenses or defendants will be the same: do the offenses or defendants to be joined arise out of a

have not addressed the issue. Indeed, we will not resolve it here because whether Rule 8(a) or (b) controls, our conclusion is the same.

In the interests of justice, we apply the less permissive standard of Rule 8(b), the same one used to analyze Eufrasio and Iacona's Rule 8 claim (*see* above, p. 28), to hold there was no misjoinder of the RICO and non-RICO counts against Idone. The gambling and extortion alleged as substantive violations in the non-RICO counts were also charged as racketeering predicates in the RICO counts. Furthermore, the gambling and extortion along with the Auferio murder conspiracy and loansharking charged against Idone, were all allegedly undertaken by him in furtherance of and in association with the same racketeering enterprise and conspiracy. Thus, joinder of the RICO and non-RICO counts against Idone was proper. All the conduct charged against Idone constituted a single series of related acts furthering the Scarfo enterprise conspiracy and its purposes.

The outcome is the same when we review Idone's pretrial motion from the angle of Rule 14. We hold that the trial court did not abuse its discretion by denying Idone's request to sever the RICO counts in their entirety.

Succinctly put, the same evidence needed to prove the gambling and extortion racketeering

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common series of acts or transactions. This need not always be the case.

Accordingly, its seems to us that contrary to the jurisprudence in other circuits, when a joinder of offenses charged against the same defendant is challenged, the literal meaning of the Rule requires application of Rule 8(a), irrespective of whether multiple defendants are involved in the case.

predicates charged in the RICO counts would also prove the non-RICO gambling and extortion allegations. Even if evidence of the Auferio murder conspiracy predicate might possibly prejudice the jury against Idone in the non-RICO phases of trial, that mere possibility did not compel Rule 14 severance as a matter of law. The jury could reasonably be expected to confine its consideration of the Auferio murder conspiracy evidence to its deliberations on the RICO counts. Furthermore, as mentioned earlier in connection with Eufrasio's and Iacona's Rule 14 severance motions, it was within the discretion of the trial court to determine if the economies afforded by a joint trial of all the charges against Idone outweighed any potential for trial prejudice caused by joinder of the RICO and non-RICO counts.[21]

VI.

*Alleged Rule 403 Errors*

Appellants argue that the trial court abused its discretion by admitting evidence of uncharged Mafia crimes at trial without articulating the balance between the probative value and the prejudicial effect of the evidence required by Federal Rule of Evidence 403, and also committed error by not providing appropriate limiting

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21. Since we hold the district court did not abuse its discretion denying Idone's Rule 14 severance motion, we need not decide whether Idone has demonstrated on appeal that the denial of his severance motion caused him "clear and substantial" trial prejudice. *See Reicherter*, 647 F.2d at 400.

instructions addressing that evidence.[22] Since an error admitting evidence is alleged, we review the trial court for abuse of discretion. *In re Japanese Electronic Products*, 723 F.2d 238, 260 (3d Cir. 1983), *rev'd on other grounds*, *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *cf. Pfeiffer v. Marion Center Area School District*, 917 F.2d 779, 781 (3d Cir. 1990) (holding that the plenary standard of *In re Japanese Electronic Products* for review of a Rule 402 relevancy ruling is "deemed without effect.")

Rule 403 permits a trial court to exclude evidence of unquestioned relevance, if its relevance is overshadowed by the risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time.[23] Admission of evidence under Rule 403 may be reversible error when the district court abuses its discretion. *See e.g., United States v. Schwartz*, 790 F.2d 1059 (3d Cir. 1989). Appellants contend there was reversible Rule 403 error.

The government asserts appellants waived any Rule 403 errors by failing to object explicitly on Rule 403 grounds when the uncharged Mafia

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22. Appellants challenge the admission of detailed evidence of uncharged Mafia crimes undertaken during the Scarfo/Riccobene mob war, and of other heinous Mafia crimes. *See* Eufrasio Br. 23-25. Appellants do not contend it was Rule 403 error to admit evidence of the Auferio murder conspiracy.

23. Fed. R. Evid. 403 reads as follows:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

crimes evidence was introduced at trial. The government points to Fed. R. Evid. 103(a) which requires that timely objection be made in order to preserve an evidentiary issue for appeal.[24] Appellants respond that their pre-trial motions *in limine* constituted Rule 403 objections for purposes of appellate review. Indeed, "[w]hile normally an objection to the admission of evidence must be raised at trial to be preserved, this court will sometimes permit evidentiary questions to be preserved by a motion *in limine*." *See Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 767 (3d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 880 (1990); *American Home Assurance Co. v. Sunshine Supermarket Inc.*, 753 F.2d 321, 324-25 (3d Cir. 1985).

We need not decide the merits of the waiver question in detail, because whether or not appellants' motions *in limine* preserved their Rule 403 claims for appeal, the district court did not abuse its discretion admitting the disputed uncharged Mafia crimes evidence. Our reasoning is as follows.

If, on the one hand, appellants' motions *in limine* did *not* constitute specific Rule 403 objections to

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24. Fed. R. Evid. 103 reads in pertinent part, as follows:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and ... [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context....
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> * * *
>
> (d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

admission of the uncharged Mafia crimes evidence, then the trial court was not required to strike a Rule 403 balance on the record *sua sponte*.

> "Since the 'specific' objection requirement of Fed. R. Evid. 103(a) was not complied with, the trial judge was not required to deal with Rule 403....[T]he dynamics of trial do not always permit a Rule 403 analysis in ... detail.... [T]o require a detailed balancing statement in each and every case is unrealistic.... *[W]here [a] Rule 403 [objection] is not invoked, the trial judge's balancing will be subsumed in his ruling.*"

*United States v. Long*, 574 F.2d 761, 766 (3d Cir.), *cert. denied*, 439 U.S. 985 (1978) (emphasis added). Thus, if we determine no Rule 403 objection was made in this case, the district court's failure to expressly weigh probative value against prejudicial effect would not be error, unless the resulting admission of evidence was otherwise an abuse of discretion. For reasons discussed below, we decide the admission of the disputed evidence was not an abuse.

On the other hand, if appellants' motions *in limine* were the equivalent of specific Rule 403 objections to the uncharged crimes evidence, then we must confront the trial court's failure to articulate its balance between the probative value and the prejudicial effect of the evidence in one of two ways: either we decide the trial court implicitly performed the required balance; or, if we decide the trial court did not, we undertake to perform the balance ourself. *See United States v. Lebovitz*, 669 F.2d 894, 901 (3d Cir.), *cert. denied*, 456 U.S. 929 (1982). Either way, the trial court's failure to expressly articulate a Rule 403 balance when faced with a Rule 403 objection, would not be reversible error *per se*. *Id.*

For purposes of deciding this appeal only, we assume that appellants' motions *in limine* constituted effective Rule 403 objections to the disputed evidence; and furthermore, that the district court implicitly struck a Rule 403 probaty/prejudice balance when it admitted the uncharged Mafia crimes evidence. Accordingly, we will affirm the district court's decision to admit that evidence, because we also decide that decision was not an abuse of discretion or plain error. Therefore, we must treat it with the utmost deference. "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *Long*, 574 F.2d at 767.

The district court did not abuse its discretion striking its implicit balance in favor of admitting the evidence. Evidence of uncharged crimes may be introduced even against a defendant without knowledge of such crimes, if the uncharged crimes are proof of some elements of the crimes actually charged against such defendant. Rule 403 does not as a rule prohibit the government from presenting its strongest possible case against criminal defendants.

> Generally speaking, it is for the prosecutor, not the defendant, to shape the government's trial strategy with a view toward sustaining its heavy burden of proof. On the other hand, the presence or absence of a genuine need for the questioned evidence is a legitimate part of the balancing analysis required by Federal Rule of Evidence 403.

*Schwartz*, 790 F.2d at 1061. *See also United States v. Sheeran*, 699 F.2d 112, 118 (3d Cir.), *cert. denied*, 461 U.S. 931 (1983).

As the district court instructed the jury, the uncharged Mafia crimes evidence admitted in this case went to prove important elements of the RICO counts charged against appellants: the existence and nature of the Scarfo enterprise and conspiracy, acts undertaken in furtherance of it, and appellants' knowing association with it. The uncharged crimes evidence demonstrated the history, structure and internal discipline of the Scarfo enterprise, and the regular means by which it conducted unlawful business. The disputed evidence was probative of appellants' respective roles within the enterprise's larger organization, history and operations. Thus, the relevance of the uncharged crimes evidence to the government's case against appellants was substantial, certainly enough to offset its potential to cause prejudice for appellants.

We also find that the disputed uncharged crimes evidence worked more of a prejudice, if any, on the credibility of the governments' own witnesses. These witnesses, former LCN members, were more directly involved in the uncharged crimes than were appellants. Furthermore, appellants were the ones who brought out some of the uncharged crimes testimony in their attempt to discredit the government's witnesses in front of the jury. It follows that appellants should not be heard now to say the disputed testimony they elicited was so prejudicial as to have impermissibly bent the jury's verdict against them.

In conclusion, we will affirm the trial court's decision to admit the uncharged crimes evidence, even though the court did not expressly articulate its Rule 403 analysis. Nevertheless, we repeat what we have said elsewhere:

> [Rule 403] balancing should be performed in the first instance and *on the record* by the trial court who is in the best position to determine the weight to be given the various relevant factors.

*Lebovitz*, 669 F.2d at 901 (emphasis added). We encourage trial courts to make their Rule 403 balancing explicit whenever possible: express reasoning always helps appellate review.

As for appellants' contention that jury instructions were so lacking with respect to admission of the uncharged crimes evidence as to require reversal, we disagree. The district court told the jury many times that appellants were to be judged individually, and only on evidence applying to the specific charges against each one. The trial court also instructed that appellants were not on trial for any uncharged conduct. Finally, appellants never requested specific limiting instructions focusing on the uncharged crimes evidence. We conclude, therefore, that there was no shortcoming in jury instructions, certainly none constituting reversible error.

VII.

*Empaneling Anonymous Jury*

Appellants contend it was error for the trial court to grant the government's motion for an anonymous jury without holding an evidentiary hearing on the issue of threats to juror safety, and without recording its reasons for granting the motion. We review the district court's decision for abuse of discretion, and must be "particularly deferential" to the trial court's "substantial discretion" to empanel an anonymous jury. *United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir), *cert. denied*, 488 U.S. 910 (1988).

In *Scarfo*, we upheld a decision to empanel an anonymous jury, reasoning that anonymity dispelled jurors' fears for their own safety. We noted this promoted impartial, dispassionate jury verdicts.

> [E]ven in routine criminal cases, veniremen are often uncomfortable with disclosure of their names and addresses to a defendant. The need for such information in preparing an effective defense is not always self-evident .... [J]ury anonymity promotes impartial decisionmaking.
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> . . . .
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> Because the [jury] system contemplates that jurors will inconspicuously fade back into the community once their tenure is completed, anonymity would seem entirely consistent with, rather than anathema to, the jury concept. In short, we believe that the probable merits of the anonymous jury procedure are worthy, not of a presumption of irregularity, but of disinterested appraisal by the courts.

*Id.* 850 F.2d at 1023. *Scarfo* resolved that empaneling an anonymous jury "is not intrinsically suggestive of any inference of guilt", at least where adequate jury instructions concerning the need for anonymity are given. *Id.* 850 F.2d at 1026. We also said in *Scarfo* that if measures are taken to inform a defendant of jury demographics and to permit ample voir dire, an anonymous jury need not impair a defendant's right to intelligently exercise peremptory challenges. *Id.* at 1022-23.

Appellants rely on *Scarfo* to argue that we should impose certain procedural prerequisites upon anonymous juries. Appellants would have us say that trial courts *must* hold evidentiary

hearings on juror safety, and *must* record their reasoning when ordering anonymous juries. However, the record in *Scarfo* indicates the trial court only heard oral argument on the anonymous jury issue. That argument was not put in the record. Furthermore, the *Scarfo* court did not issue findings when it granted the government's motion for an anonymous jury. We conclude *Scarfo* is not precedent for the new procedural requirements appellants recommend.

A trial court has discretion to permit an anonymous jury without holding an evidentiary hearing on juror safety, if the court believes there is potential for juror apprehension. A trial judge is usually well-aware of the ambience surrounding a criminal trial and the potential for juror apprehensions. Publicity surrounding previous Scarfo enterprise-related racketeering prosecutions may well have raised, in this case, juror apprehensions for their own safety, and a corresponding desire on the part of the judge to ease that tension. In such a situation, an anonymous jury is justified, as long as defendants are afforded full voir dire. We find no evidence that appellants were not afforded such voir dire here, or that empaneling the anonymous jury otherwise prejudiced the jury against appellants. Thus, we hold the trial court did not abuse its discretion ordering the anonymous jury in this case.

While a trial court may hold the hearings and make the record findings recommended by appellants, these procedures are not required as a matter of law. Thus, the trial court's failure to articulate express findings when it impaneled the anonymous jury was not reversible error. We will, however, suggest a better practice, that trial judges record their findings and reasons when they

empanel anonymous juries. Recorded findings facilitate intelligent appellate review. Our position here parallels our approach in other discretionary contexts. *See, e.g., Lebovitz*, 669 F.2d at 901 (counseling trial courts to preserve a record of their balancing under Fed. R. Evid. 403).

VIII.

*Alleged Errors with Respect to Extortion*

Eufrasio and Iacona claim Count Three of the superseding indictment never clearly identified the intended victim of the attempted extortion, but rather ambiguously identified the extortion target as "Action Vending, its officers, owners, agents, employees, and business associates". App. 62. They claim they were surprised and prejudiced by evidence that Action and Automatic were associated business ventures. On this ground, appellants requested a pretrial bill of particulars, and later, a specific jury instruction.[25] They say it was reversible error for the district court to deny their requests, and that the jury instructions on the extortion charge given by the district court were inadequate.

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25. The jury instruction proposed by appellants (App. 365) read, in part, as follows (emphasis added):

> Count Three of the Indictment charges each of the defendants with interference of commerce by threats or violence. The indictment identifies the principals, officers, directors and associates of Action Vending Company, Alfonse Sanbi's [sic] company, as the victims of the extortion. As such, *it is the extortion of Alfonse Sanbi [sic] and his company and not some other person or company* which is the crime charged in Count Three of the Indictment and on which you must deliberate. There has been testimony concerning Ronald Lee. *Ronald Lee is not an owner of Action Vending and as such he is not the victim of the extortion alleged in Count Three of the Indictment.*

Whether to grant a bill of particulars lies in the discretion of the trial court, and denial is reviewed for abuse of discretion. *United States v. Armocida*, 515 F.2d 49, 54 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975). Since the purpose of a bill of particulars is not to permit "wholesale discovery of the Government's evidence", Eufrasio and Iacona must establish on appeal that denying their requested bill prevented them from developing a meaningful defense against surprise evidence. *Id.* Furthermore, an indictment charging a statutory crime is sufficient if it substantially follows the language of the criminal statute, provided that its generality does not prejudice a defendant in preparing his defense nor endanger his constitutional guarantee against double jeopardy. *See United States v. Addonizio*, 451 F.2d 49, 58 n.7 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972).

Applying these standards, we hold the trial court did not abuse its discretion denying appellants' request for a bill of particulars. The extortion count in the superseding indictment provided appellants with adequate notice of the allegations against them, and it tracked the language of the federal extortion statute by specifying the time period of the alleged offense, its victims, objectives and extortionate means.[26]

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26. Compare the language of 18 U.S.C. § 1951 (quoted in pertinent part in note 8 herein), with the language of Count Three of the superseding indictment (App. 62-63, emphasis added):

> From in or about March, 1986, up to and including December, 1986, in the Eastern District of Pennsylvania and elsewhere ... defendants ... did unlawfully and knowingly attempt to obstruct, delay, and affect commerce ... and attempted to do so, by

Also, Eufrasio and Iacona have not shown they were prejudiced or surprised by evidence that Action and Automatic, and their representatives and business associates, were affiliated. Count Three of the indictment clearly stated that the alleged extortion was against "Action Vending, its officers, owners, *agents, employees, and business associates*." App. 62 (emphasis added). Automatic was Action's business associate. Appellants' were given tapes of intercepted conversations revealing they knew Action and Automatic were associated business ventures, and that Lee, Lupi and both Sanbes were variously associated with Action, as its partners, agents or employees. These conversations and the language of the indictment belie appellants' surprise claim. Eufrasio and

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extortion as that term is defined in Title 18, United States Code, Section 1951(b)(2): to wit, they attempted to obtain the property of Action Vending, its officers, owners, *agents, employees, and business associates*, that is the right to pursue a business including the right to business accounts and unrealized profits, the right to solicit business, and the right to compete with the defendants' video poker machine business and any other company engaged in the business of operating video poker machines, said property to be obtained with the consent of Action Vending, its owners, officers, *agents, employees, and business associates*, such consent being induced by the wrongful use of actual and threatened force, violence and fear including the fear of financial, economic and physical injury to Action Vending, its owners, officers, *agents, employees, and business associates* in that the defendants demanded that Action Vending, its owners, officers, *agents, employees, and business associates* remove their video poker machines from certain locations, refrain from soliciting the defendants customers, and refrain from offering more favorable business terms that [sic] those offered by the defendants.

Iacona had adequate knowledge to develop a defense against the extortion charge.

As for appellants' requested jury instruction on the extortion count, we hold the district court did not err refusing to give it. Refusing a requested instruction is error "only if the instruction was correct, not substantially covered by other instructions, and was so important that the omission of the instruction prejudiced the defendant." *United States v. Smith*, 789 F.2d 196, 204 (3d Cir.), *cert. denied*, 479 U.S. 1017 (1986). Here, the instruction requested was incorrect because it differed substantially from the indictment. Appellants' requested instruction would have restricted jury deliberations to evidence of extortionate acts aimed directly at Action *alone*, whereas Count Three of the indictment was much broader: it charged extortion of Action's *business associates, agents and employees*, such as Automatic, Lee Sanbe, and Lupi.

Finally, we hold appellants were not prejudiced by the refusal to give the requested instruction, because the instruction actually given by the district court adequately covered the attempted extortion charge. Appellants do not contend the district court's instruction was incorrect, but rather, they argue the district court did not adequately explain "what was charged in Count 3, who was the victim and what was the nature of the extortionate demand." Eufrasio Br. at 26. We disagree. The record shows the district court instructed the jury correctly on all essential elements of the charge, and advised it to refer to a copy of the superseding indictment which the jury retained during deliberations.

## IX.

### *Alleged Errors with Respect to Collection of Unlawful Debt*

Eufrasio argues that the government was required to corroborate his tape recorded statements which proved he collected unlawful debts. Eufrasio's contention is without merit because tape recorded statements, such as his own, made prior to or during the commission of a crime, need not be corroborated.[27] *See United States v. Muskovsky*, 863 F.2d 1319, 1324-25 (7th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989); *United States v. Raymond*, 793 F.2d 928, 930-31 (8th Cir. 1986).

Eufrasio also alleges that it was error not to prove he engaged in a "continuous" business of making usurious loans, because evidence that he made a single unlawful loan cannot show such continuity[28]. That is not the law. While 18 U.S.C. § 1961(6) requires that an unlawful debt collected have been "incurred in connection with the

27. Since we reject Eufrasio's corroboration argument, we also hold the district court did not err 2by refusing to give Eufrasio's requested jury instruction, which incorporated a corroboration requirement.

28. Since Eufrasio did not raise this argument in his Rule 29 motion for a judgment of acquittal, we will review it only for plain error. *See Riccobene*, 709 F.2d at 229. As our discussion of the law indicates, Eufrasio's claim is without merit, and therefore, we hold there was no plain error.

Furthermore, even if it was plain error to fail to prove Eufrasio and his co-appellants engaged in a "continuous" business of making unlawful loans and collecting unlawful debts, their RICO convictions would stand nonetheless on their conspiracy to participate, and participation in, the conduct of the affairs of the Scarfo enterprise through a pattern of illegal gambling and attempted extortion.

*business* of gambling ... or the *business* of lending money or a thing of value" at usurious rates, a "continuous" business of making unlawful loans is not required. Only one act of collecting or attempting to collect unlawful debt is necessary to establish that predicate act. *See United States v. Vastola*, 899 F.2d 211, 228 n.21 (3d Cir.), *vac'd on other grounds*, ___ U.S. ___, 110 S.Ct. 3233 (1990); *see also United States v. Pepe*, 747 F.2d 632, 645, 673-75 (11th Cir. 1984). An actual exchange of cash need not be shown, only a single act which would tend to induce another to repay on an unlawful debt incurred in the business of lending money. *See Pepe*, 747 F.2d at 673-45.

Finally, Iacona claims it was error for the government not to allege or prove appellants threatened persons for failure to repay unlawful loans. This claim has no merit because threats are simply not an element of the offense of collection of unlawful debts under relevant federal and state usury laws. *See, similarly, United States v. Biasucci*, 786 F.2d 504, 512-13 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986) (holding that defendant's knowledge of the specific interest rates charged on usurious loans is not needed for a collection of unlawful debts violation under RICO).

X.

*Sufficiencies of Evidence*

Each appellant claims that various insufficiencies of evidence warrant reversals of their convictions. The standard governing our review of sufficiency claims is whether, viewing the evidence in a light most favorable to the government, there was substantial evidence upon which a reasonable jury could have based its verdict. *United States v. Leon*, 739 F.2d 885, 890

(3d Cir. 1984). "The evidence need not unequivocally point to the defendant's guilt as long as it permits the jury to find the defendant guilty beyond a reasonable doubt." *Pungitore*, 910 F.2d at 1129. After carefully reviewing appellants' claims, which are set forth below, we find them to be without merit.

Idone argues trial evidence was insufficient to prove that appellants' acts of illegal gambling, attempted extortion, and usurious lending constituted participation in the conduct of Scarfo enterprise affairs, as is required by 18 U.S.C. § 1962(c). He claims evidence was insufficient to prove appellants were "employed by or associated with" the Scarfo enterprise when undertaking these prohibited acts. *See* § 1962(c)[29]. He alleges

29. The 'association' requirement of 18 U.S.C. § 1962(c) requires that any defendant prosecuted thereunder "must be shown to have been aware of at least the general existence of the enterprise named in the indictment". *Castellano*, 610 F.Supp. at 1401. The same is true if a defendant is charged under § 1962(d) with a conspiracy to violate § 1962(c). *United States v. Jannotti*, 729 F.2d 213, 226 (3d Cir.), *cert. denied*, 469 U.S. 880 (1984) ("In order to establish a conspiracy to violate section 1962(c), 'the government must prove beyond a reasonable doubt that ... the individuals knowingly agreed to participate in the "enterprise" through a pattern of racketeering.'" *Id.* at 226, quoting *Riccobene*, 709 F.2d at 220-21.) This association requirement insures "that the government show, at a minimum, that the defendant was aware of the existence of a group of persons, organized into a structure of some sort, and engaged in ongoing activities, which the government can prove falls within the definition of enterprise contained in section 1961(4)." *Castellano*, 610 F.Supp. at 1401. It is not necessary that a RICO defendant have "specific knowledge of every member and component of the enterprise"; rather, "it is sufficient that the defendant know the general nature of the enterprise and know that the enterprise extends beyond his individual role." *United States v. Rastelli*, 870 F.2d 822, 827-28 (2d Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 515 (1989).

also that there not sufficient evidence showing appellants participated in the Scarfo enterprise by collecting unlawful debts, and were "actually in the business of making loans at unenforceable rates". Idone's Amended Br. at 29. Finally, Idone claims evidence was insufficient to prove any extortion conspiracy or attempted extortion. Idone claims that evidence of threats made by him only shows he was angry about, and wanted to retaliate for vandalism of several of Iacona's video poker machines. Idone's Amended Br. 32-36.

Eufrasio and Iacona also assert there was insufficient evidence showing that their respective participation in the charged pattern of racketeering constituted participation in the conduct of Scarfo enterprise affairs, or that they were each employed by or associated with the enterprise when engaged in the charged racketeering.[30] They also say that trial evidence was insufficient to prove the necessary relationship among the Auferio murder

30. Iacona alleges relatedly (*see* Iacona Br. 15-17) that the district court erred when it: (1) refused appellants' requested jury instructions on the 'association' requirement of § 1962(c), which would have cautioned the jury not to consider the enterprise's name ("Scarfo Family") as evidence of appellants' guilt (Iacona Br. at 16); (2) "highlighted" the prejudicial name of the enterprise while restating the government's evidence of each appellant's association with the Scarfo organization (*id.*); (3) failed to "specifically" caution the jury that "they must be satisfied with such evidence beyond a reasonable doubt" (*id.*); and (4) told the jury that "the government must show [appellants'] ... association in fact as part of its burden to show the existence of the enterprise". *See id.*, referring to district court instruction at App. 3380.

After reviewing these allegations of error, we find them to be without merit. The district court's instructions concerning the association requirement of § 1962(c) were correct, and appellants were not prejudiced by the refusal of their requested instructions.

conspiracy and other charged predicate acts, or that these acts show continuity of racketeering activity. Like Idone, Eufrasio and Iacona argue that evidence did not prove they each committed extortionate acts or collected unlawful debts, or that any such acts were related to the LCN.

After careful review of the entire record on appeal, we conclude none of appellants' several sufficiency claims has merit. Without reciting the pertinent trial evidence, we hold that evidence was sufficient to permit a reasonable jury to conclude beyond a reasonable doubt, as the jury in this case did, that each appellant committed each crime for which they stand convicted in this case.

XI.

*Conclusion*

Having carefully considered Idone's, Eufrasio's and Iacona's appeals, we find them to be without merit. We will affirm the judgments of sentence and conviction with respect to each.

A True Copy:
Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

**APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING JUDGMENT FILED MAY 15, 1991**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1267

UNITED STATES OF AMERICA

V.

MARIO EUFRASIO, a/k/a Murph,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 89-00021-02)

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No. 90-1268

UNITED STATES OF AMERICA

V.

SANTO IDONE, a/k/a Sam, a/k/a Sam from Chester, a/k/a Papa, a/k/a Big Santo,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 89-00021-01)

*Appendix B*

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No. 90-1305

UNITED STATES OF AMERICA

V.

GARY S. IACONA,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 89-00021-02)

Nos. 90-1267, 1268 and 90-1305

PRESENT:
GREENBERG, HUTCHINSON and NYGAARD, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel October 11, 1990.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered April 13, 1990, be and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

*Appendix B*

s/ Sally Mrvos
Clerk

May 15, 1991

Certified as a true copy and issued in lieu
of a formal mandate on June 27, 1991

Test: s/ Sally Mrvos

Clerk, United States Court of Appeals
for the Third Circuit.

**APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING APPELLANTS' PETITION FOR REHEARING FILED JUNE 19, 1991**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1267

UNITED STATES OF AMERICA

V.

MARIO EUFRASIO, a/k/a Murph,

Appellant

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No. 90-1268

UNITED STATES OF AMERICA

V.

SANTO IDONE, a/k/a Sam, a/k/a Sam from Chester, a/k/a Papa, a/k/a Big Santo,

Appellant

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*Appendix C*

No. 90-1305

UNITED STATES OF AMERICA

V.

GARY S. IACONA,

Appellant

SUR PETITION FOR REHEARING

Present:

SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having boted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ _____
Circuit Judge

Dated: June 19 1991

## APPENDIX D — ORDER OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA GRANTING GOVERNMENT'S MOTION FOR ANONYMOUS JURY FILED JANUARY 2, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 89-00021-1-2-3-4

UNITED STATES OF AMERICA

v.

SANTO IDONE, ET AL.

ORDER

AND NOW, this 2nd day of January, 1990, upon consideration of the government's motion for a sequestered and anonymous jury, and the defendants' response thereto, it is hereby Ordered that:

1. the motion for an anonymous jury is Granted.

2. the government's motion for a sequestered jury is Denied.

The court adopts the following special procedures:

1. The United States Marshal is Ordered to pick up and disperse the jurors from a neutral site each day at trial;

2. The jury is Ordered sequestered during the period between their pick up and dispersal each day from the neutral site.

*Appendix D*

BY THE COURT:

s/ Robert F. Kelly
Robert F. Kelly
J.